SUPREME COURT, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975
NO. 75-497

RICHARD BUSH and MICHAEL LESLIE EINSTEIN, individually and as representative of similarly situated residents of the State of Florida,

Appellants,

v.

JAMES A. SEBESTA, as Supervisor of Elections of Hillsborough County, Florida, REUBIN O'D. ASKEW, as Governor of the State of Florida, JAMES TAYLOR, as Clerk of the Circuit Court of Hillsborough County, Florida, DOROTHY W. GLISSON, as Secretary of State of the State of Florida, and their successors in each office,

Appellees.

On Appeal from the United States District Court for the Middle District of Florida.

MOTION TO AFFIRM (BUSH and EINSTEIN) MOTION TO DISMISS (FAIR), and BRIEF OF APPELLEES

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Appellees.

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MOTION TO DISMISS (FAIR)

Appellees move to dismiss this appeal as to Appellant, Jim Fair, and as grounds therefor submit:

1. Final Judgment in this cause was entered below on June 2, 1975.

2. Appellant Fair filed Notice of Appeal on August 19, 1975.

3. Pursuant to 28 U.S.C. §2101(b), plaintiffs below had sixty days from the date final judgment was entered (June 2, 1975) in which to file notice of appeal.

4. Appellant Fair's Notice of Appeal was untimely and this Court lacks jurisdiction as to Appellant Fair.

MOTION TO AFFIRM (BUSH and EINSTEIN)

Appellees move to affirm the judgment of the lower court on the ground that, it is manifest that the questions raised on this appeal are so insubstantial as to require no futher argument.

BRIEF IN SUPPORT OF MOTION TO AFFIRM

ARGUMENT

I.

FLORIDA'S PETITIONING ALTERNATIVE FOR IMPECUNIOUS CANDIDATES, INCLUDING THE 21 DAY PERIOD FOR GATHERING SIGNATURES, CLEARLY MEETS THE REQUIREMENTS OF THE CONSTITUTION.

Like California's petitioning process for independent candidates (Storer v. Brown, 415 U.S. 724, 39 L.Ed.2d 714, 94 S.Ct. 1274 (1974)), Florida requires that impecunious candidates seeking to qualify by the petitioning alternative in lieu of paying a filing fee obtain signatures on their petitions during a specific period of time. Though Storer addressed the petitioning alternative provided for independent candidates, the issue is the same: whether Florida's 21 day limit for gathering signatures is too great a burden to pass constitutional muster considered in the total context of Florida's petitioning scheme.

Florida has several compelling interests for having the petitioning process occur within a 21 day period. First, to qualify for the petitioning alternative, a prospective candidate must be truly impecunious either because of lack of his own resources or because of the unavailability of other resources. Florida has a compelling interest to insure that a candidate first makes a reasonable effort to

raise funds. If that does not succeed, the candidate may then resort to the petitioning alternative. Of course, a candidate could elect to do nothing and make no attempt to raise funds in the earlier months before an election, but at least he has an incentive to first make a good faith effort to raise funds before utilizing the petitioning alternative. Also, as recognized on numerous occasions by this Court, a state such as Florida has a strong interest in having petitions indicate serious support. Support is not serious if signatures are old and stale. Having petitions signed in a three week period insures that the support is both real and current, and in this manner the petitioning alternative serves the same state interest as a filing fee.

When this Court remanded Storer, it commented:

> "Standing alone, gathering 325,00 signatures in 24 days [the California period was limited to 24 days] would not appear to be an impossible burden. Signatures at the rate of 13,820 per day would be required, but 1,000 canvassers could perform the task if each gathered 14 signers a day. On its face, the statute would not appear to require an impractical undertaking for one who desires to be a candidate for President." 39 L.Ed. at 729; 415 U.S. at 740.

Storer then asked:

> "If the required signatures approach 10% of the eligible pool

> of voters, is it necessary to serve the State's compelling interest in a manageable ballot to require that the task of signature gathering be crowded into 24 days?" (Emphasis supplied, footnote omitted.) 39 L.Ed.2d at 731.

Florida requires that persons seeking to qualify because unable to pay a filing fee obtain signatures on a petition equal in number to 5% of the voters registered in that party in the district as of the last general election. Unlike Storer, there is no "evaporation" of the pool of eligible signers since any currently registered voter in the district in the same party can sign. The court below found that a candidate seeking statewide office in Florida would need approximately 115,000 signatures or about 5,477 signatures per day during a 21 day period. Using the Storer canvasser example, a candidate would have needed only 5-6 signatures per day from each canvasser (or 10-12 signatures per day from 500 canvassers statewide).

Thus, even though contained within a 21 day period, the petitioning alternative provided by Florida is not unreasonable or impossibly burdensome. This is especially true when Florida's petitioning alternative is viewed in its totality, as this Court did in Jenness v. Fortson, 403 U.S. 431, 29 L.Ed. 2d 554, 91 S.Ct. 1970 (1971). Jenness reviewed Georgia's 5% petitioning alternative for independent candidates, and therein found that Georgia imposed "no suffocating restrictions whatever upon the free circulation of nominating petitions."

The Florida petitioning alternative for those unable to pay the filing fee is similarly unfettered, open and unrestricted; the only requirement is that signatures be obtained from voters registered in the same party. Otherwise, petition signers may sign as many petitions as they wish, need not state that he or she intends to vote for the petitioner, may sign the petition if currently registered even though not registered for the last election, and are not barred from signing because of voting or a failing to vote in the last election. Compare, American Party of Texas v. White, 415 U.S. 767, 39 L.Ed.2d 744, 94 S.Ct. 1296 (1974). The signature does not have to be notarized and in fact will be validated even if not in the same form as the registered name if a comparison evidences an identity of person. (Section 99.095(2), F.S.) Moreover, like Georgia in Jenness, Florida permits write-in candidates (Section 101.011, F.S.).

Florida's petitioning alternative with its 21 day limit is thus on its face free, unencumbered, and not impermissibly burdensome in keeping with Jenness and Storer. Of course, as this Court stated in Storer, Florida's past experience with the procedure "will be a helpful, if not always unerring guide." But at this date Florida has not had sufficient time to build any track record one way or the other. The Florida petitioning alternative became law in June, 1974, and has thus existed for only one General Election. The lack of petitions may indicate a lack of knowledge that the law exists as well as (as Appellant argues) an indicia that the process may be burdensome. Appellant points out that nine independent candidates sought to qualify in 1974 by petition and six were successful, as well as one minority party and its five

candidates. The petitioning success of these petitioners may well be attributable to the fact that independents and minority parties have been allowed to obtain ballot status by petition since 1970 (Chapter 70-269, Laws of Florida), and thus have had two prior general elections to exercise the new opportunity.

In sum, considered in its entirety, it is submitted that Florida's petitioning alternative (including the 21 day provision) is in no way unduly burdensome, serves compelling state interests, and provides real unencumbered alternatives for impecunious candidates. Appellants' arguments raise no substantial issues.

II.

TO ALLOW AN IMPECUNIOUS CANDIDATE FROM A MULTI-MEMBER DISTRICT TO QUALIFY BY OBTAINING A LESSER PERCENTAGE OF SIGNATURES FROM HIS OR HER CONSTITUENTS THAN REQUIRED OF A CANDIDATE FROM A SINGLE-MEMBER DISTRICT WOULD BE A DENIAL OF THE EQUAL PROTECTION OF THE LAWS TO THE SINGLE-MEMBER DISTRICT CANDIDATE.

Appellants' argument that indigent candidates from multi-member districts should be allowed to obtain a lesser number of signatures to satisfy the alternative method for qualifying is nothing more than an attack upon the concept per se of multi-member districts.

Surely the question of the validity of a multi-member district has been foreclosed by this Court. See Dallas County, Alabama v. Reese, _____U.S. _____, 44 L.Ed.2d 312,

95 S.Ct. ____(1975); Dusch v. Davis, 387 U.S. 112, 18 L.Ed.2d 656, 87 S.Ct. 1554 (1967); Fortson v. Dorsey, 379 U.S. 433, 13 L.Ed.2d 401, 85 S.Ct. 498 (1965).

If a multi-member district is permissible as a concept, it should follow that the direct and immediate consequences of such a district should also be valid. As this Court has noted on several occasions (See Dallas County, supra, 44 L.Ed.2d at 315), if the tenure of an official from a multi-member district ". . . depends upon a county-wide [or district-wide] electorate he must be vigilant to serve the interests of all people in his home district." As a corollary, during a campaign a candidate for a multi-member seat must persuade the voters of the entire district to vote for his or her candidacy. To reduce such a candidate's petitioning requirement by 400% or 500% as suggested by Appellants[1] would have the direct effect of diminishing by 400% or 500% the effectiveness of Florida's petitioning alternative as a means to identify serious, potentially successful candidates.

Where the Equal Protection Clause is concerned, "sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike . . . ." Jenness v. Fortson, 403 U. S. 431, 29 L.Ed.2d 554, 91 S.Ct. 1970 (1971). If an equal protection right exists, it lies with candidates for single member districts. Would it be not unfair for such impecunious candidates to be required to obtain signatures

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[1]Florida requires signatures from 5% of the registered electorate in the district in the same party. Appellant suggests this should be reduced to 1/4 or 1/5 of 5%.

from 5% of their available electorate, while allowing multi-member district candidates to qualify after obtaining only 1% or 1.25% of their available pool of signers?

Appellants show no tangible proof that an impecunious candidate from a multi-member district has a greater difficulty in qualifying by the petitioning method. Appellants' speculation is based solely upon the numbers of signatures required. But since one can as easily speculate that there is no extra burden because the pool of signers is proportionately larger in a multi-member district, Appellants' arguments fail for lack of evidence.

In short, Appellants have not shown in law or fact that Florida's petitioning alternative for multi-member districts is invalid.

III.

FLORIDA'S FILING FEE IS VALID IN ALL RESPECTS.

It is difficult to tell by Appellants' third argument whether Appellants contest the validity per se of a 5% filing fee, or whether Appellants attack Florida's ultimate disposition of the filing fee. The only Appellant with standing to raise these issues is Einstein. Bush contends an inability to pay any fee, and thus could be injured only if the petitioning alternative is in some manner insufficient. Einstein, on the other hand, is one who drew upon funds intended for educational and living expenses and paid the fee. In short, Einstein is one who is merely unwilling, not unable to pay. Compare, Bullock v. Carter,

405 U.S. 134, 146, 31 L.Ed.2d 92, 101, 92 S.Ct. 849 (1972).

Florida's filing fee of 5% of the annual salary of the office sought has been sustained by numerous courts below: Adams v. Askew, 511 F.2d 700 (5th Cir. 1975); Fair v. Taylor, 359 F.Supp. 304 (M.D. Fla. 1973) (the case sub judice); Spillers v. Slaughter[2], 325 F.Supp. 550 (M.D. Fla. 1971); Fowler v. Adams, 315 F.Supp. 592 (M.D. Fla. 1970), appeal dism'd, 400 U.S. 986, 27 L.Ed.2d 436, 91 S.Ct. 477; Wetherington v. Adams, 309 F.Supp. 318 (N.D. Fla. 1970); Differenderfer v. Homer, (No. 68-455-Civ-Ec., S.D. Fla. 1968); Bodner v. Gray, 129 So.2d 419 (Fla. 1961). Florida's filing fee serves multiple state interests that are

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[2]Spillers is misquoted by Appellant. Footnote 1, part III, of Appellants' brief states: "whatever minimal expenses the parties might incur, the benefit of fees has been termed incidental in Spillers v. Slaughter . . . ." The correct quote from Spillers (after the court mentioned the usual state interests in requiring filing fees) is:

> "Moreover, the fact that the fee operates incidentally to defer party expenses in conducting the primary and to provide campaign funds for the nominee in the general election does not render the fee concept invalid."
> 325 F.Supp. at 553.

clear and substantial. The filing fee focuses the election process on serious candidates, and thereby trims the size of the ballot, precludes voter confusion, assures that voting machines can work effectively, avoids run-off elections, and defrays expenses. Adams v. Askew, supra, 511 F.2d at 704; Lubin v. Panish, 415 U.S. 709, 712-13, 39 L.Ed.2d 702, 706-7, 94 S.Ct. 1315 (1974). Defraying election expenses is only one of several state interests.

Of course, a filing fee system is not perfect; a wealthy person without serious intent or support can become a candidate. But the same can be said of the petitioning system. An impecunious candidate with a small but loyal following can achieve ballot status by the petitioning process even though his or her candidacy has no chance of success. The point is that Florida has provided an alternative system open to all on equal terms. Appellants' arguments at this date are insubstantial and fly-specking.

Appellants complain that a large portion of Florida's filing fee is distributed to political parties and suggest as an alternative that Florida by-pass the parties and require each candidate to spend his filing fee in his campaign. Aside from the administrative impossibility of allowing candidates to qualify for the ballot by spending a certain sum of money in a campaign (a sum which would be unascertainable until the eve of the election), distribution of filing fee monies unencumbered to political parties has been approved by this Court in its memorandum opinion Cassidy v. Willis, ____ U.S. ____, 42 L.Ed.2d 636, ____ S.Ct. ____ (1974), affirming Cassidy v. Willis, 323 A.2d 598 (Dela. 1974). In

Cassidy v. Willis, supra, the Delaware Supreme Court affirmatively found that a state has a legitimate interest in supporting political parties "so as to encourage and strengthen them," and declined to rule its filing fee statute unconstitutional either because the fee was passed on to the party or because the fee was passed on unencumbered. 323 A.2d at 602. Additionally, at least four three-judge federal district courts have been confronted with a filing fee scheme in which a large part of the fee is distributed to support political parties, and in each of these cases, the Court indicates at least tacit recognition that support of political parties is a substantial state interest. Harper v. Vance, 342 F.Supp. 136, 144 (N.D. Ala. 1972); Spillers v. Slaughter, 325 F. Supp. 550, 553 (M.D. Fla. 1971); Fowler v. Adams, 315 F.Supp. 592, 595 (M.D. Fla. 1970); Wetherington v. Adams, 309 F.Supp. 318, 321 (N.D. Fla. 1970).

This Court has many times recognized the importance of political parties, Williams v. Rhodes, 393 U.S. 23, 30, 21 L.Ed.2d 24, 31 89 S.Ct. 5 (1968); Kuspers v. Pontikes, 414 U.S. 51, 57, 38 L.Ed.2d 260, 266, 94 S.Ct. 303 (1973), and has noted that at times political parties and government necessarily intertwine in their functions. See Smith v. Allwright, 321 U.S. 649, 88 L.Ed. 987, 64 S.Ct. 757 (1944). Florida, like California in Storer v. Brown, "believes with the founding fathers that splintered parties and unrestrained factionalism may do significant damage to the fabric of government." 415 U.S. at 736; 39 L.Ed.2d at 727. Appellants suggest that candidates rather than parties be given their filing fees for campaign expenses. Florida has chosen otherwise. Surely Florida's

decision to support and preserve that party system is a compelling state interest, a compelling interest when joined with the need to limit the ballot to serious candidates and defray state expenses, is more than sufficient to sustain the judgment of the court below.

CONCLUSION

Florida's filing fee system and petitioning alternative are so clearly within the guidelines of Bullock, Jenness, and Storer that the issues raised by this appeal are without substance and should be disposed of without further argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Motion to Affirm (Bush and Einstein); Motion to Dismiss (Fair), and Brief of Appellees, were served by first class mail this 28 day of October, 1975, on each of the following:

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